SUPREME COURT, U. S.

No. 801

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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1968

JOANNE HIRSCHFIELD, SEYMOUR HIRSCHFIELD, AARON PAUL, DR. FLORENCE ROSS, DR. NORMAN T. YONENAGA, ROBERT ZIMMER, LORRAINE ZIMMER, ALICE JEAN STRAUSS, MICHAEL M. PHILLIPS, and GEORGE C. STIMELING, LENE PAREY and SAMUEL PAREY,

Petitioners,

vs.

EDWARD J. BARRETT, COUNTY CLERK OF COOK COUNTY, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Joanne Hirschfield, Seymour Hirschfield, Aaron Paul, Dr. Florence Ross, Dr. Norman T. Yonenaga, Robert Zimmer, Lorraine Zimmer, Alice Jean Strauss, Michael M. Phillips, George C. Stimeling, Lene Parey and Samuel Parey, petitioners, pray that a writ of certiorari issue to review a final judgment of the Supreme Court of Illinois.

OPINION BELOW

The opinion of the Supreme Court of Illinois is included in the transcript of the record (R. 13); is set forth in full in Appendix "A" hereto, pp. 1-10, and is officially reported in 40 Ill. 2d 224, 239 N.E. 2d 831.

JURISDICTIONAL STATEMENT

The final judgment of the Supreme Court of Illinois was rendered May 29, 1968. A timely petition for rehearing (R. 15) was filed, and denied on September 17, 1968; the judgment thereupon becoming final.

Subdivision (3) of Section 1257 of Title 28, Judiciary and Judicial Procedure, is relied upon as giving jurisdiction to the Supreme Court of the United States to review the final judgment of the Supreme Court of Illinois in this cause. It reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States. June 25, 1948, c. 646, 62 Stat. 929." (U.S.C.A. Title 28, Sec. 1257(3).)

It appears clearly from the opinion of the Supreme Court of Illinois that the validity of a State Statute is drawn in question on the ground that it is repugnant to

the Constitution of the United States. Additionally, the amendment to the Constitution of Illinois found in Article VI is likewise challenged under the United States Constitution in that it, too, makes provision for a special privilege for one judicial circuit which is denied to all of the other judicial circuits which are entitled to equal treatment. To guarantee apportionment of the total number of associate judges allotted for one judicial circuit, while apportionment is not provided for all other judicial circuits on a similar basis, is a denial of due process and equal protection as it is guaranteed by the 5th and 14th Amendments to the United States Constitution.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED

Petitioners seek a review of the final judgment of the Supreme Court of Illinois (R. 13) which sustained a final judgment of the Circuit Court of Cook County denying to petitioner, Michael M. Phillips, the office of Associate Judge of the Circuit Court of Cook County, outside the City of Chicago, to which petitioners claim he had been elected in a duly conducted general election, to fill the unexpired portion of the term of Associate Judge H. R. Stoffels, who had died.

The complaint alleged that the vacancy was not on the ballot, and they were voters who had voted for Phillips in that election by writing in his name for that office. The voters, joined as co-plaintiffs, filed a verified complaint in the Circuit Court of Cook County, alleging that their votes had not been counted and had not been reported and they sought a temporary injunction enjoining Edward J. Barrett, County Clerk of Cook County, Illinois. from destroying the ballot boxes and ballots in certain

named voting precincts. The complaint alleged, further, that by virtue of said write-in votes, Phillips received the only votes that were cast to fill that vacancy and hence he was elected to fill the unexpired portion of that term. The complaint charged that the judges and clerks of election in those election precincts had violated their oath of office and failed to discharge their duties imposed upon them under the election laws of the State of Illinois, and alleged that Phillips was a duly licensed attorney at law, met the requirements for election to such office and that as the result of the death of Associate Judge H. R. Stoffels that office was vacant under the provisions of the Judicial Article (Article VI) of the Constitution of Illinois. Write-in votes were necessary because the office was not on the ballot in that election, although the vacancy was required to be filled pursuant to the said Judicial Article.

George C. Stimeling, in Count II of the complaint, alleges that he is a citizen of the United States and a resident of Peoria County outside the City of Peoria, is a registered and qualified voter, and he complains that both section 72.41(4) of Chapter 37, of the Illinois Revised Statutes, and that portion of Article VI, the Judicial Article in the Illinois Constitution, setting apart the area in Cook County outside the City of Chicago for the election of Associate Judges is unconstitutional, and violates Section 1 of the 14th Amendment and Section 1 of the 15th Amendment to the United States Constitution, and Section 18 and Section 11 of Article II of the Illinois Constitution. He complains that failure to make like provision in similar circumstances denies to all the other judicial circuits uniformity, lacks equality, constitutes a denial of procedural due process, denies the citizens outside of Cook County equal protection of the laws and denies them their civil rights. He charges that a general provision could

have been made in the Judicial Article VI of the Illinois Constitution, but was not made and that therein there is a violation of Section 22 of Article IV of the Illinois Constitution.

He asks the Court to declare the apportionment provision found in Chapter 37, Section 72.41(4) and in Section 8 of Article VI of the Illinois Constitution, discriminatory and unconstitutional, null and void, and in violation of the 14th Amendment of the U. S. Constitution (R. C12-13).

The thrust of Count II, brought by a citizen of Peoria County, is that the apportionment provision found in both the statute and in the Judicial Article is invalid in that a special privilege is provided for one judicial circuit which can never be attained by any of the other judicial circuits.

The Supreme Court of Illinois ruled that Article VI, the Judicial Article of the Constitution of Illinois, and Section 72.41 of Chapter 37 of the Illinois Revised Statutes are valid and constitutional, tested by both the Illinois Constitution and the Constitution of the United States.

It is the theory of the petitioners that the statute complained of, and that portion of the Judicial Article complained of, violate the 14th Amendment of the United States Constitution in that a special privilege is provided for one judicial circuit which privilege is denied to all the other circuits and can never be attained by any other circuits. Only the first judicial circuit is guaranteed apportionment of the total number of associate judges alloted for that circuit. There are other judicial circuits throughout Illinois which are alloted several associate judges, but there is no provision guaranteeing apportionment of those associate judges as provided for Cook County.

The questions were first raised in the trial Court by the Complaint (R. C8, C12).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the legislature of the State of Illinois can adopt an Act which gives one judicial circuit the privilege of apportionment of the total number of associate judges allotted to that circuit, while denying a similar apportionment privilege to all of the other judicial circuits of the State, without doing violence to the guarantee of due process of law and equal protection of the laws under the 5th and 14th Amendments to the Constitution of the United States.

(2) Whether an amendment to a State Constitution can provide for a special privilege for one judicial circuit, which is denied to all of the other judicial circuits and can never be attained by any other judicial circuit, without violating the 5th and 14th Amendments guarantee of due process of law and equal protection of law.

(3) Whether paragraph (4) of section 72.41 of Chapter 37, Ill. Rev. Stat. (1965) relating to vacancies in the office of associate judge in the City of Chicago violates Sections 22 and 34 of Article IV of the Illinois Constitution and whether as a consequence thereof, the entire provision, with respect to Cook County is void.

CONSTITUTIONS AND STATUTES INVOLVED

The determination of the questions involved depend upon the 5th Amendment and Section 1 of the 14th Amendment to the Constitution of the United States, on parts of Article IV and VI of the Constitution of Illinois and on Section 72.41(4) of Chapter 37 of the Illinois Revised Statutes, all of which appear in Appendix "B", hereto attached pp. 11-15.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I.

The provisions of the statute complained of, and of the Illinois Constitution as amended by the adoption of the Judicial Article VI effective January 1, 1964, create a special privilege for one judicial circuit which is denied to all of the other judicial circuits of the State; these provisions are void because equal protection and due process of law are denied to all judicial circuits other than Cook County.

Both the Statute, and that portion of the Judicial Article itself which provides for apportionment of associate judges only in Cook County, should be declared violative of the 5th and 14th Amendments to the United States Constitution. No judicial circuit can, under the present Constitution of Illinois, as so amended, enjoy the privilege of apportioning the total allotted number of associate judges of any judicial circuit, other than Cook County. This is neither a general nor a uniform law relating to the court system in Illinois (*The People* v. *The City of Chicago*, 310 Ill. 534, 539).

Special legislation is prohibited by Section 22 of Article IV of the Constitution of Illinois and the Statute and that portion of the Judicial Article complained of clearly constitute special legislation for Cook County. In *Strong* v. *Dingman*, 207 Ill. 385, the Administration Act of the State of Illinois was challenged and the Supreme Court of Illinois there held the Act unconstitutional as special legislation because it only applied to Cook County, saying (p. 390):

> " * * * A law, which provides a different mode of appointment or selection, for a county having a population of 200,000 inhabitants or over, from that which provides for such appointment or selection in counties having a less number of inhabitants, is a special law regulating the practice in courts of justice. It makes the practice as to the mode of appointing and selecting administrators different in one county from what it is in other counties, without resting such difference upon any reasonable basis of classification. * * * "

The Supreme Court of Illinois there states the rule that there shall be no special laws regulating the practice in courts of justice in Illinois. The effect of that decision was to condemn any provision of law in Illinois which would permit the appointment or the selection of administrators in one county on a basis different from that which is required in other counties, without resting such difference upon a reasonable basis of classification. Population differences between judicial circuits will not alone justify a special law. Providing apportionment in one judicial circuit and not in others cannot be condoned constitutionally. If it is based upon population differences, such a provision for apportionment must be accomplished in a fashion that would permit any judicial circuit which attains the status of the classification to be automatically entitled to the same privilege without seeking or having to seek further amendment of the Constitution. In brief, to be done validly, it must be done by a general law.

The Court goes to great length in its opinion to explain why the "Attrition Statute" is not in derogation of Article VI. The Court does not, however, explain why the "Attrition Statute" is immune to Section 22 and Section 34 of Article IV of the Constitution of Illinois. The Court's opinion only casually observes, in passing, that the plain-

tiffs claim that the "Attrition Statute" is repugnant to section 22 and section 34 of Article IV of the Constitution, but the opinion fails to say a word concerning why the limitation in section 34 has no impact on the "Attrition Statute". Article IV provides that:

> "No law based upon this amendment to the Constitution, affecting the Municipal Government of the City of Chicago, shall take effect until such law shall be consented to by a majority of the legal voters of said City voting on the question at any election . . . "

The opinion of the Court ignores Sam and Lene Parey, voters of Chicago, who are plaintiffs. The opinion of the Court completely ignores the case of *City of Chicago* v. *Reeves,* 220 Ill. 274, relied on by them, which holds that a law affecting the judiciary of the City of Chicago *is* such a law that requires approval as provided in section 34 of Article IV. The opinion completely ignores the fact that the "Attrition Statute" is such a law affecting the judiciary of Chicago and ignores the fact that it was not submitted to the voters of Chicago for approval as required by section 34 of Article IV.

The Court concludes its opinion with the arbitrary holding that the Court will not tolerate upsetting the "Attrition Statute". In support of this the Court cites three cases, none of which even remotely discusses the question of when a statute affecting the Municipal Government of Chicago need not, under Article IV, be submitted to the voters of the City of Chicago. None of these cases is authority that under some circumstances the requirement of section 34 of Article IV may be ignored or waived. The opinion completely fails to explain why the "Attrition Statute" is not violative of and is not in derogation of section 34 of Article IV of the Constitution of Illinois.

It now seems to be the rule of law that the adoption of Article VI acts as an implied repeal of that provision of Article IV which guarantees that no law affecting the judiciary of the City of Chicago shall become effective in Chicago until it is approved by a majority of the legal voters voting on the law. If this be true, the citizens of Chicago have been deprived of a constitutional right without ever having known that the new Judicial Article contained this threat to them. Certainly, nowhere in any of the statements promulgated and issued during the long fight for the Judicial Article, is there the slightest hint that it contained the seed of such a startling and shocking result.

The refusal of the Illinois Supreme Court to consider the Pareys' complaint deprives them of due process of law and is an additional ground for this Court to grant certiorari.

II.

An Amendment to the State Constitution is not immune from the necessity of complying with the Federal Constitution.

In 16A C.J.S., section 459, p. 174, it is said:

> "* * * The same tests apply in determining whether a law violates state constitutional provisions prohibiting the enactment of any law granting special privileges or immunities as apply in determining whether it violates the guaranty under the Fourteenth Amendment of the Federal Constitution of equal protection of the laws."

It is settled that the States' powers are subject to the Fourteenth Amendment. The constitution of the State of Illinois was approved and the admission of the State to the Union followed. No provision of or amendment to the State Constitution can violate the rights of its citizens

which are secured by the Federal Constitution. (*Standard Scale Co.* v. *Farrell,* 249 U.S. 571, 577; 63 L. ed. 780 (1919). The Judicial Article of the State Constitution is not above the Federal Constitution.

The Constitution of Illinois (Section 8, Article VI) directs that the legislature shall prescribe the number of associate judges that each judicial circuit shall have. But the challenged statute ignores the prescribed basis of "judicial circuit" and arbitrarily provides the number of judges by "Counties". This constitutes a denial of due process.

The equal protection of the laws required by the Fourteenth Amendment denies the right, even in a State Constitution, to discriminate between voters by creating judicial circuits in Illinois which are unequal as to voting rights. No constitutional justification appears which supports the creation of a circuit which splits up the Cook County circuit into the part inside the City of Chicago and outside it. No such provision is made for any other county in the State.

It is not possible for any other county to achieve the right to have associate judges elected by a division into out-of-city votes and in-city votes because the constitutional provision is explicit in its limitation to Chicago and Cook County. Other counties in the State have similar big-city situations, but not even by growing to Chicago's population can they achieve this individual control of the right to vote for associate judges in the same fashion.

The discriminatory treatment need not be belabored, it is obvious. The Fourteenth Amendment is violated and the Illinois constitutional provision should be declared void in this regard.

The same constitutional requirement that each person shall have an equal vote requires that each voter for the associate judges in Cook County shall have a vote equal to every other voter's and there can be no diminution thereof by electing associate judges from the City of Chicago separately from those in Cook County outside of the City of Chicago.

III.

The Supreme Court of Illinois has erred in construing the Constitution of Illinois to permit the Statute to deny to the voters of the City of Chicago their constitutional right under Section 34 of Article IV to vote on any changes affecting the judicial system of the City of Chicago.

Section 34 of Article IV of the Illinois Constitution in the second paragraph, provides:

> "No law based upon this amendment to the Constitution, affecting the Municipal government of the City of Chicago, shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special; * * *".

This too is ignored by the Statute assailed. The Statute makes no provision for referendum in the City of Chicago, although it clearly makes provision for the judiciary of the City of Chicago, *limiting the right* to vote there to fill vacancies upon deaths of judges. It is a law which affects the City of Chicago and has never been consented to in any referendum in the City of Chicago.

In the case of *City of Chicago* v. *Reeves,* 220 Ill. 274, the Supreme Court had before it the validity of the then new Municipal Court Act. The Court found that the establishment of a municipal court was germane to the object of establishing a local municipal government for Chicago and the Court noted that the Act *was consented to by the legal voters of the City of Chicago* at the general election held

in said City on the first Tuesday after the First Monday of November 1905, in a referendum. The Court (p. 298) asked this question: "Is, therefore, the creation of a municipal court in the City of Chicago germane to the establishment of a local municipal government for the City of Chicago?", and answered "We think this question must be answered in the affirmative". Further, the Court said, at (page 301):

> "If it be germane to the establishment of local municipal government in the City of Chicago to establish a municipal court, we are unable to see why it is not germane to that object to abolish the offices of justices of the peace, police magistrates, and constables in said City and to limit the jurisdiction of justices of the peace in Cook County to territory outside of the city. The municipal city court created is designed to occupy the field of jurisprudence heretofore occupied by justices of the peace and police magistrates in said City, and clearly if it is germane to the establishment of local municipal government in said City to create a municipal court, it is equally germane to abolish the courts already existing in said City and which are to be superseded by said municipal court, otherwise there would exist in the City of Chicago courts of conflicting jurisdiction, the effect of which would be to obstruct the administration of, rather than to administer, the law in said City * * *."

This establishes that any Act, local, special, or general, if it is germane to or affects the local municipal government in the City of Chicago, to be effective must be approved by a majority of the voters voting on the question at an election in the City of Chicago. It clearly points out that a municipal court for the City of Chicago is germane to the establishment of local municipal government and falls in the category of that which requires referendum, to be effective, under Article IV, Section 34 of the Illinois Constitution.

Just as it was the municipal court that was designed and created to occupy the field in jurisprudence previously occupied by justices of the peace and police magistrates, so the office of Associate Judge of the Circuit Court for the City of Chicago is created and designed to now occupy the field of jurisprudence heretofore occupied by the associate judges of the municipal court. Inasmuch as it affects the local municipal government of the City of Chicago, the legislature alone cannot bind the City of Chicago by its enactment of Section 72.41, par. 4, relating to vacancies in the office of associate judge. That provision is ineffective in the City of Chicago until voted upon by qualified electors in the City of Chicago who approve that provision which affects the City of Chicago and its government. That the court system of the City of Chicago is an integral and highly important part of its municipal government is an undebatable issue and since the Constitution in Article IV, Section 34, reserves to the people of Chicago the right to reject or accept what the legislature may provide for its court before it becomes effective, it is clear that that portion of paragraph 4 of Section 72.41, purporting to affect Chicago, has never become effective *in the City of Chicago* because it has never been approved by the qualified electors of Chicago. No provision is therein made for such referendum.

It should be noted that under the former Municipal Court Act, approved in a referendum election in Chicago, the people of the City of Chicago had the legal right to vote for candidates to fill vacancies created by death of Judges in the Municipal Court of Chicago for unexpired terms. *They were not deprived of that right in the Constitution* as amended *by Article VI,* in Section 10. The judicial amendment provided "The office of any judge shall be deemed vacant upon his death * * *. Whenever a vacancy occurs

in the office of judge, the vacancy shall be filled for the unexpired portion of the term by the voters at an election as above provided in this Section, or in such other manner as the General Assembly may provide by law as set out in this Section and approved by the electors * * *." This Court should not condone or approve the present legislative restriction as a binding and effective restriction against filling vacancies *in the City of Chicago* without referendum approval expressed in Chicago. See *The People ex rel.* v. *The City of Chicago,* 310 Ill. 534, holding that a subsequent amendment also requires a referendum to become effective.

CONCLUSION

Much has been heard of concerning the need for law and order. A return to law and order on the part of our people in the streets in Illinois is hopeless while our representatives in high public office pay only lip service to the State and Federal Constitution. It is necessary that our public officers, in the discharge of their public duties, be the first to set the meticulous example of adhering to the principles of our law. It is unjust to insist that the people respect the ordinances and statutes while public officers ignore the Constitution and withhold from the people their constitutional right to a referendum in which the Constitution provides the people of Chicago shall have the right to approve or reject a law affecting the Judiciary of the City of Chicago. The voting rights of these Petitioners have been ignored and denied.

This Court will make a significant contribution toward bringing about a return to law and order by stating clearly that *all* must honor and obey the commandments of the organic law, both State and Federal.

Because both the State and Federal Constitutions have been violated, we pray that this Court will grant certiorari.

Respectfully submitted,

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